In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 789

KRIEGER-RAGSDALE & COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 27-32) is reported at 379 F. 2d 517. The Board's decision and order (J.A. 3-36)[1] are reported at 159 NLRB No. 53.

JURISDICTION

The court of appeals rendered its decision on May 25, 1967, and a petition for rehearing was denied on

[1] "J.A." refers to the Joint Appendix filed in the court below. Citations preceding a semicolon refer to the Board's findings; those following, are to the supporting testimony.

August 8, 1967 (Pet. 2, 27). The petition for a writ of certiorari was filed on November 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly concluded that the National Labor Relations Board had not abused its discretion to determine appropriate collective bargaining units by establishing, instead of a single plant-wide unit, one unit for the employer's lithographic production employees, and another unit for its bindery, shipping, and receiving department employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 2-14 of the petition.

STATEMENT

Petitioner is engaged in the job printing business. It prints college directories, restaurant placemats, notebooks, and other "advertising specialities" (J.A. 5; 55), using both letter presses and lithographic or offset presses.[2] In May 1965, Local 73 L, Lithograph-

[2] A letter press produces a printed impression by pressing an unprinted sheet against a raised, inked surface. This process, often described as "mechanical," differs from the "chemical" lithographic process in which a plane surface, chemically treated so that ink adheres only to its image producing parts,

ers and Photoengravers International Union, AFL-CIO ("Lithographers"), petitioned the Board for certification as the bargaining representative of the Company's employees enagaged in lithographic work (J.A. 38). At about the same time, International Brotherhood of Bookbinders, AFL-CIO, petitioned for certification as the bargaining representative of the Company's bindery, storage, shipping, and receiving room employees (J.A. 38). Pursuant to Section 9(c)(1)(A) of the Act (Pet. 4), a hearing was held on the petitions, and the Board's Regional Director made the following findings, based on the testimony of petitioner's manufacturing manager, Mel Holder:

A group of petitioner's employees perform traditional lithographic work—preparing plates for use on lithographic presses, operating the presses, and preparing paste-ups and lay-outs. These employees include two full time paste-up men and a lithographic lay-out man, supervised by Holder; a cameraman, a stripper, and plateman, supervised by Foreman McKinnie; and eight lithographic press operators, supervised by Production Manager and Foreman Hilgeman (J.A. 37-38; 56, 66-67, 75-78, 85-86). Some of these employees work in other departments, but none for more than 128 hours per year and only when work is slack or when overtime is available elsewhere. Such extra-lithographic work is entirely voluntary (J.A. 69, 77, 99, 100).

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is brought into contact with a revolving rubber blanket, which in turn transmits the ink-image to the material. See *National Labor Relations Board* v. *Weyerhaeuser Company*, 276 F. 2d 865, 869 (C.A. 7), certiorari denied, 364 U.S. 879.

Petitioner also has employees who work in what Holder called the "binding, shipping, and receiving department" (J.A. 41; 58-59). Those employees operate a paper cutter, stitching machines, folders, gathering machines, and a perfect binder.[3] Except for the paper cutter operator, none of the bindery department employees has completed an apprenticeship program and all go "from one job to another" in the bindery (J.A. 41; 58-59). The shipping clerk works in the shipping room "in connection with the bindery" (J.A. 41; 87). All the employees who work in this department are supervised by the same foreman (J.A. 38; 53, 58).[4]

Upon the foregoing facts, the Board's Regional Director found that petitioner's lithographic production workers were primarily engaged in traditional lithographic work, and that, in accordance with the Board's practice of ordinarily establishing separate lithographic production units if the employees so desire (see *infra*, p. 6), a unit consisting of these employees was appropriate for collective bargaining

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[3] A perfect binder runs gathered books over a saw blade, across a glue wheel, and then to a platform, where a paper cover is applied (J.A. 55).

[4] Petitioner also employs four other employees who work in the letter press and composition department (J.A. 38; 53, 58). All four work under the supervision of the same foreman, and their working area is separated from the lithographic area by an aisle (J.A. 57-58, 65-66). Like the other employees in the plant, the employees in this department occasionally work elsewhere when work in their department is slack or when overtime is available (J.A. 100).

(J.A. 38-40).[5] The Regional Director further found that employees in the bindery, shipping, and receiving department likewise constituted an appropriate bargaining unit, since those employees worked in the same general area, under the same supervision, and constituted a homogeneous group whose functions and interests were distinct from those of the other employees (J.A. 41-43). He accordingly directed an election in each of these units, which the respective Unions won and were certified (J.A. 43-44, 7).

Petitioner refused to bargain with the Unions; an unfair labor practice complaint issued; and the Board, sustaining the prior unit determinations, found that petitioner had violated Section 8(a)(5) and (1) of the Act. The Board issued the usual cease-and-desist order, and directed the Company to bargain with the Unions upon request. (J.A. 3-4, 4-34.)

The court of appeals found that, on the facts of this case, the Board was reasonable in establishing one unit for the lithographic production employees, and another unit for employees in the bindery, shipping, and receiving department, and enforced the Board's order. (Pet. 27-32.)

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[5] Included in the unit were the offset press operators, cameraman, strippers, plate makers, and paste-up employees and layout men who perform preparatory lithographic work. Excluded were compositors in the composing room (who performed traditional composing room work), and letter press operators (since such employees exercised skills and duties usually associated with the letter press craft) (J.A. 39).

ARGUMENT

The holding of the court below that the Board was reasonable in establishing two separate units for collective bargaining at petitioner's plant turns on the facts of this particular case, and is correct. There is thus no issue warranting further review.

Section 9(b) of the Act empowers the Board to decide whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In view of this broad grant of power, and the expertise involved in such determinations, the Board's selection of an appropriate unit is not to be disturbed unless the agency has acted arbitrarily or capriciously. *Packard Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491-492. As the court below correctly concluded, the Board's unit determinations in this case were entirely reasonable.

The court below noted that for many years it has been a "general policy of the Board * * * to sever lithographic employees when the differences in skill and duties between lithographic and other types of printing employees is so great as to cause the lithographers to constitute a distinct group possessing a community of interest" (Pet. 30).[6] This was the situation here. Petitioner's lithographic employees rarely work outside of their department, and they

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[6] See *Con P. Curran Printing Co.*, 57 NLRB 185; *National Labor Relations Board* v. *Weyerhaeuser Co.*, 276 F. 2d 865, 870-871 (C.A. 7), certiorari denied, 364 U.S. 879. Cf. *Pacific Press, Inc.*, 66 NLRB 458.

are supervised separately from the other employees (*supra*, p. 3). Similarly, the bindery, shipping, and receiving department constituted a distinct group of employees with a community of interest.[7] They work almost exclusively within their own department;[8] they are supervised by the same foreman; and, except for the shipping clerk and paper cutter machine operator, they interchangeably operate the various machines which perform customary bindery functions (*supra*, p. 4; J.A. 41, 59).[9]

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[7] Bindery employees have long been considered an appropriate unit for collective bargaining. See, *e.g.*, *Lloyd Hollister, Inc.*, 55 NLRB 32; *A.J. Showalter Co.*, 64 NLRB 573, 580-581; *Drug Package Co., Inc.*, 101 NLRB 1123, 1126.

[8] They work outside the department only voluntarily and for relatively few man-hours per year (J.A. 41, n. 5; 60, 85-86, 96-97, 100).

[9] The Board similarly was justified in its placement of particular employees within or outside the units (see Pet. 20-21). Hurt was placed in the bindery unit, rather than the lithography unit, because petitioner's plant manager testified that her assignment outside the bindery was temporary (J.A. 42; 77, 90). Loetzerich and Miller were excluded from the units because both devote substantial time to clerical work (J.A. 40, 42; 90, 106, 107, 108). The two janitors were excluded from the bindery, shipping, and receiving department unit because, separately supervised and regularly working outside the department, they were not part of it (J.A. 41-42; 53, 91, 95-96). College student Diekmann, a summer employee, lacked a reasonable expectancy of permanent employment and was thus excluded as a "casual" (J.A. 42-43). See *Brown-Foreman Distillers Corporation*, 118 NLRB 454, 455. The letter press operators (Hart and Privette) were excluded along with compositors Graff, Gaddis and Walker because they perform functions traditionally related to letter press and composing operations, and are supervised separately (J.A. 38, 40-41; 53, 57-58, 61, 79-80, 82, 104, 106).

There is no substance to petitioner's contention (Pet. 22-25) that the court of appeals applied the wrong standard in reviewing the Board's action. Since the basic facts were undisputed, the issue before the court was not whether the findings were supported by substantial evidence, but whether the Board acted reasonably in weighing those facts and drawing inferences therefrom. The Board's selection of an appropriate unit, which involves those processes, "is to be accepted if it has 'warrant in the record' and a reasonable basis in law" (*National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131; see *Packard Co., supra*). The court of appeals applied that standard here. It stated (Pet. 29): "The controversy relates essentially to the judgment on the facts. Our function, therefore, is to review the Board's exercise of discretion and decide whether the Board's unit determinations were reasonable, as applied to the facts." The fact that Congress amended the Act in 1947 to provide that the Board's findings of fact are to be conclusive if supported by substantial evidence "on the record considered as a whole" (Section 10 (e), Pet. 10) does not indicate that Congress intended to change the standard of review of Board unit determinations. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488-489; *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 48-50.[10]

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[10] *Celanese Corp.* v. *National Labor Relations Board*, 291 F. 2d 224 (C.A. 7), certiorari denied, 368 U.S. 925, and *National Labor Relations Board* v. *Bata Shoe Co.*, 377 F. 2d 821 (C.A. 4), certiorari denied, October 23, 1967 (No. 456), upon which

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER, 1967.

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petitioner relies (Pet. 25), are distinguishable. Those were cases in which the courts set aside, as unsupported by substantial evidence, Board determinations that misrepresentations made by a union during an election campaign did not interfere with the employee's freedom of choice to a degree warranting the setting aside of the election. The cases turned on their particular facts, and there may be a greater breadth for judicial review of such determinations than for the unit determinations here involved.

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